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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 81-5372

MARGIE BULLARD BARFIELD, Petitioner,

V.

STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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September 8, 1981

QUESTION PRESENTED

WHETHER A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

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NO. _____

MARGIE BULLARD BARFIELD,

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-v-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, Margie Bullard Barfield, prays that a writ of certiorari issue to review the final order of the Supreme Court of North Carolina denying review of the judgment of the Superior Court of Robeson County, North Carolina in state post-conviction proceedings. The final order of the Supreme Court of North Carolina was entered on July 9, 1981, and the judgment of the Superior Court of Robeson County was entered on November 26, 1980.

OPINION BELOW

The Supreme Court of North Carolina did not render an opinion herein. Rather, that court denied review of the opinion of the Superior Court of Robeson County. The Supreme Court order denying review is attached hereto as Appendix B. The Superior Court's opinion is unreported and is attached hereto as Appendix A.

JURISDICTION

The final order of the Supreme Court of North Carolina was filed on July 9, 1981. By operation of North Carolina

law, the judgment of the Superior Court of Robeson County was thereby allowed to stand as the final judgment on Petitioner's state post-conviction proceedings. A petition for rehearing was not filed in the Supreme Court of North Carolina, for such petitions are not entertained in criminal cases. Rule 31(g), N.C. Rules of Appellate Procedure. This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) This case involves the Eighth and Fourteenth Amendments to the United States Constitution.

(2) This case further involves one of the provisions of the North Carolina death penalty statute, G.S. §15A-2000(b). The entire statute is set forth as Appendix C to this petition.

STATEMENT OF THE CASE

On March 28, 1978, the Robeson County Grand Jury returned an indictment charging the Petitioner with the murder of Stewart Taylor. [Record at 15-16.][1] Thereafter, the venue of Petitioner's case was transferred to Bladen County, and Petitioner was tried between November 27, and December 2, 1978. (R. 56-63, 4-12.)

At the trial, the prosecution presented testimony that prior to and on January 31, 1978, Ms. Barfield and Stewart Taylor were going together and that Mr. Taylor lived in St. Pauls, North Carolina (Defendant's Exhibit 1, at pp. 324-325.)[2] Until January 31, 1978, Taylor, who

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[1] "Record" refers to the record of the proceedings in the Superior Courts of Robeson, Scotland, and Bladen Counties, North Carolina, which is on file in the Supreme Court of North Carolina [hereinafter referred to as "R"].

[2] This exhibit is the two-volume transcript of the original trial at which Ms. Barfield was convicted and sentenced to death. (Footnote continued on page 3)

was then fifty-six years old, had been in good health (DX-1 at 325). During the night of January 31, 1978, however, Taylor became ill with flu-like symptoms (DX-1 at 326-327) and over the course of the next three days, become increasingly more ill (DX-1 at 328-337). Finally, on the night of February 3, 1978, Taylor was taken by ambulance to Southeastern General Hospital in Lumberton, North Carolina where he died at approximately 9:40 P.M. (DX-1 at 310-312). An autopsy conducted after Taylor's death revealed that the cause of death was acute arsenic poisoning (DX-1 at 364-365).

Ms. Barfield was initially questioned about Stewart Taylor's death on March 10, 1978 by two Robeson County deputy sheriffs. At that time, she denied having any part in his death (DX-1 at 570-571). Three days later, however, on March 13, 1978, Ms. Barfield was questioned again by the same deputy sheriffs, and during the course of this questioning, she admitted having put Terro Ant Poison [the label of which read, "May be fatal if swallowed," (DX-1 at 577)] into Stewart Taylor's beverages on February 1, 1978 (DX-1 at 576). Ms. Barfield said that prior to January 1, 1978, she had forged some checks on Stewart Taylor's account, that he had discovered the forgeries, and that he had threatened to turn her in if she forged any more checks (DX-1 at 575). After this happened, on January 31, 1978, Ms. Barfield forged another check on Taylor's account. Worried that Taylor would discover her latest forgery, she poisoned Taylor "to make him sick," (DX-1 at 638) in order to obscure the forgery.

In her case at trial, Ms. Barfield presented

(Footnote continued)

It was marked and entered as Defendant's Exhibit 1 in the post-conviction hearing on the Amended Motion for Appropriate Relief. Hereafter, it will be referred to as "DX-1," and the pages within it as "at 324-325."

psychiatric testimony showing that at the time of Taylor's murder and for the preceding ten years, she suffered from a severe depression, that she was a "passive-dependent" or "passive-aggressive" personality, and that she suffered from the symptoms of severe and chronic drug abuse. (DX-1 at 591-606, 673-718) In particular, her manner of abusing drugs often kept her strongly sedated, dulled intellectually, and on some occasions, in a hypnotic state. (DX-1 at 676-678, 690-692) On the day she poisoned Stewart Taylor, Ms. Barfield had taken the combination of drugs which produced these effects on her (DX-1 at 745).

After the jury found Ms. Barfield guilty of first-degree murder, a separate sentencing proceeding was held, pursuant to G.S. §15A-2000, to determine whether she should be sentenced to death or life imprisonment. At the sentencing hearing, the prosecution presented no additional evidence, and Ms. Barfield presented additional evidence concerning the nature and extent of her drug addiction (DX-1 at 838-847).

Upon the close of the sentencing hearing, the jury was instructed to consider three aggravating circumstances[3] and two specific mitigating circumstances.[4] (DX-1 at 885-899). The jury was also instructed that its sentencing verdict had to be unanimous:

> "Again, Members of the Jury, your answers to these issues [concerning aggravating and mitigating circumstances] and your recommendation [of a sentence] must be unanimous. All twelve of you must agree upon your answers to the

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[3]The murder was committed for pecuniary gain, G.S. §15A-2000(e)(6), and to hinder enforcement of the law, G.S. §15A-2000(e)(7), and the murder was especially heinous, atrocious, or cruel, G.S. §15A-2000(e)(9).

[4]The murder was committed while the defendant was under the influence of mental or emotional disturbance, G.S. §15A-2000(f)(2), and the capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was impaired, G.S. §15A-2000(f)(6).

issues and your recommendation."

(DX-1 at 900) However, the trial judge said nothing about the consequences of the jury's failure to reach a unanimous verdict. In its verdict, the jury found that all three of the aggravating circumstances were present, that the mitigating circumstances did not outweigh the aggravating circumstances, that the aggravating circumstances were sufficiently substantial to call for the death penalty, and that Ms. Barfield should be sentenced to death. (DX-1 at 901-902) Judgment and sentence were imposed accordingly on December 2, 1978. (R. 51-52)

Pursuant to the provisions of G.S. §15A-2000(d), Ms. Barfield thereafter appealed her conviction and sentence to the Supreme Court of North Carolina. On November 6, 1979, however, the Court found no error and upheld Ms. Barfield's conviction and sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

Following the decision by the Supreme Court of North Carolina, Ms. Barfield petitioned this Court for a writ of certiorari. Her petition was denied on June 30, 1980, but she then filed a petition for rehearing. Rehearing was denied on September 17, 1980.

On October 3, 1980, Ms. Barfield initiated state post-conviction proceedings by filing a motion for appropriate relief in the Superior Court of Bladen County. Among other claims raised in her motion for appropriate relief, Ms. Barfield alleged that her constitutional rights had been violated by the trial court's instructing the jury to return a unanimous sentencing verdict without also informing the jury of the consequences of a non-unanimous verdict. (Motion for Appropriate Relief, ¶18)

The hearing on Ms. Barfield's motion for appropriate relief commenced on November 17, 1980 and continued through November 21, 1980. On November 26, 1980, the

Superior Court entered judgment denying and dismissing Ms. Barfield's motion for appropriate relief. The court's opinion is attached hereto as Appendix A. Among other conclusions of law, the court held as follows:

> "It is not constitutional error for the trial judge to refuse to advise the jurors in a capital case of the consequences of their failure to reach a nonunanimous verdict as to the sentence recommendation."

(Appendix A, p. 35)

Thereafter, Ms. Barfield filed a timely petition for a writ of certiorari in the Supreme Court of North Carolina to review Judge Braswell's judgment. However, on July 9, 1981, the Supreme Court denied certiorari without opinion. The court's order to this effect is attached hereto as Appendix B. Proceedings before this Court were then commenced.

REASON FOR GRANTING THE WRIT

A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Section 15A-2000(b) of the North Carolina death penalty statute provides as follows with respect to the jury's sentencing verdict:

> "The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors....
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment;...."

While the North Carolina death penalty statute thus requires the imposition of a life sentence upon the sentencing jury's failure to reach a unanimous verdict, capital juries in North Carolina are never instructed by the courts as to this consequence. Moreover, in Petitioner's case, as well as in two other North Carolina cases, the North Carolina courts have held that there is no duty to instruct jurors as to the

consequences of their failure to reach a unanimous sentencing verdict. See Appendix A, page 35, paragraph 16. See also, State v. Hutchins, ____ N.C. ____, 279 S.E.2d 788, 807 (1981); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752, 761-762 (1979).

In addition to North Carolina, thirteen other states have similar provisions in their death penalty statutes, requiring the imposition of a life sentence upon the sentencing jury's inability to reach a unanimous verdict.[5] While most of these states have not yet determined whether the jury must be advised of the consequences of their inability to reach a verdict on punishment, there is a clear conflict among the states which have reached this issue. Centering upon whether the Eighth and Fourteenth Amendments require such an instruction, North Carolina and two other states have held there is no requirement, while Louisiana has held there is a requirement.

The conflict among the states on this issue points to another conflict--between the states which have determined that this instruction is not required and this Court, whose prior decisions clearly indicate that the instruction must be given as a matter of federal constitutional law.

Petitioner submits that certiorari should be granted to resolve both of these conflicts. By such action, this Court can cure the constitutional defect raised by the North Carolina courts' position on this issue and can give guidance to the numerous states which have not yet addressed the issue.

A. The conflict among the states on this issue reveals a fundamental disregard for the Eighth Amendment.

The decisions of the North Carolina courts and the Louisiana Supreme Court on this issue are in direct conflict.

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[5]For a complete list of these states, and the particular statutory provision for each state, see Appendix D.

Like the North Carolina death penalty statute, the Louisiana death penalty statute also provides for the mandatory imposition of a life sentence upon the sentencing jury's failure to reach a unanimous verdict. However, unlike the North Carolina Supreme Court, the Louisiana Supreme Court has held, as a matter of federal constitutional law, that capital juries in Louisiana must be instructed as to the consequences of their failure to reach a unanimous sentencing verdict. State v. Williams, 392 So.2d 619, 633-635 (La. 1980). As developed herein, the North Carolina Supreme Court's contrary holdings reveal a fundamental disregard for the commands of the Eighth and Fourteenth Amendments.

In Williams, the Louisiana Supreme Court framed its analysis of this issue in constitutional terms. Citing this Court's prior landmark death penalty [illegible]sions,[6] the court inquired as to whether the trial court's failure (in that case) to instruct the jury concerning the consequences of their inability to reach a unanimous sentencing verdict created a substantial risk that the death penalty was imposed in an arbitrary and capricious manner. The court's inquiry led it to conclude that such a risk was created under these circumstances.

> "In the present case the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court must impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.

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[6] Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

> "Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action. The death penalty was imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."

State v. Williams, supra, 392 So.2d at 634-635.

In contrast to the Louisiana Supreme Court in Williams, neither the North Carolina Supreme Court nor any other North Carolina court has engaged in a careful Eighth Amendment-based analysis of this issue. In its most extensive analysis of this issue, the North Carolina Supreme Court began with the premise that the trial judge's duty to impose a life sentence upon the jury's failure to reach a unanimous sentencing verdict was "not a proper matter for jury consideration." State v. Johnson, supra, 259 S.E.2d at 761-762. The remainder of the court's analysis consisted of the following:

> "G.S. 15A-2000(b) provides, in part, that after hearing the evidence, argument of counsel, and instructions of the court, the jury shall render a sentence recommendation based upon its consideration of the aggravating and mitigating circumstance or circumstances it finds to exist. At best, the requested instruction would be of absolutely no assistance to the jury in making its recommendation. At worst, the instruction would permit the jury to escape the onerous task of recommending the sentence to be imposed. The trial judge's refusal, or failure, to give the requested instruction was in all respects proper."

Id. at 762. Thus, while the court did not explicitly address the Eighth Amendment concerns raised by the failure to instruct, it nonetheless addressed, but disregarded, those concerns implicitly when it determined that the failure to instruct was "in all respects proper."[7]

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[7]Footnote on page 10.

The conflict between North Carolina and Louisiana on this issue is of ever greater significance when viewed in the context of all the states having similar statutory provisions (requiring imposition of a life sentence upon the jury's failure to reach a unanimous verdict on punishment). Among the remaining twelve states, only Virginia and Tennessee have taken a position on whether the jury must be instructed concerning the consequences of non-unanimity at the sentencing hearing. The supreme courts of both states have sided with the North Carolina Supreme Court in holding that such an instruction is not required. Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87, 92-93 (1980); Houston v. State, 593 S.W.2d 267, 278 (Tenn. 1980). Thus, ten other states have not yet decided this issue.[8] Because this aspect of the states' capital sentencing schemes impacts upon so many states, this Court's guidance is needed in order to maximize the chances that the death penalty will be fairly applied as between states with similar statutory schemes. Moreover, because the majority of the states whose courts have decided this issue have rendered decisions in conflict with the prior decisions of this Court, the conflict with these decisions must be exposed, and the law settled.

B. The decisions of the Supreme Courts of North Carolina, Virginia, and Tennessee on this issue are in conflict with the prior decisions of this Court.

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[7] In Petitioner's case, this issue was given even greater summary treatment than in Johnson. Without any analysis, the Superior Court held that the failure to instruct was "not constitutional error," (Appendix A, p. 35, ¶16), and the North Carolina Supreme Court declined review of this and other errors.

[8] While Pennsylvania [Consolidated Statutes Annotated, Title 18, §§1311(c)(iv), (v) (1978)] and Utah [Code Annotated, Title 76, §76-3-207(2) (1977)] both require the jury to be instructed as to the consequences of non-unanimity on punishment, the courts of these states have not construed these provisions. Thus, it is not clear whether these provisions are based upon state or federal law.

In Furman v. Georgia, 408 U.S. 238 (1972), this Court held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner. In order to "minimize the risk of wholly arbitrary and capricious" infliction of the death penalty, this Court subsequently held that the discretion of the sentencing body must be "suitably directed and limited...." Gregg v. Georgia, 428 U.S. 153, 189 (1976). With the decision in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court further detailed the guidance necessary for the sentencing body's discretion to be "suitably directed and limited." The sentencing body's discretion must be channeled

> "...by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" [Footnotes omitted.]

Godfrey v. Georgia, supra, at 427-428. Taken together with Beck v. Alabama, 447 U.S. 625 (1980), which cautioned that death penalty schemes must also prevent irrelevant considerations from being interjected into the jury's deliberations, at 642-643, these cases clearly mean that the guidance given to jury discretion must foreclose the consideration of irrelevant information in addition to pointing to relevant information.

In the context of Petitioner's case, the North Carolina scheme for imposing the death penalty unquestionably failed to meet this requirement. By failing to inform the jury in Petitioner's trial about the consequences of their inability to reach unanimity on the question of punishment, the trial court permitted a totally irrelevant consideration to enter into the jury's deliberation process. The court injected the false assumption that a jury deadlock on sentence would lead to no sentence being imposed upon Petitioner and to the necessity of holding a new hearing or trial. See State v. Williams, supra, 392 So.2d at 634;

State v. Johnson, supra, 259 S.E.2d at 767 (Exum, J., dissenting). With this false assumption injected into the jury's deliberation process, a substantial risk developed that a juror who conscientiously believed that the evidence called for a life sentence decided, nonetheless, to vote for the death penalty because of a desire to avoid the assumed consequences of a jury deadlock. State v. Williams, supra.[9] A substantial risk thus developed at Petitioner's trial that she was sentenced to die, not because of the individual, conscientious assessment of the evidence by twelve people, but because of the subtle, powerful pressure

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[9]This risk was powerfully confirmed at Petitioner's state post-conviction hearing when Dr. James Luginbuhl, a social psychologist on the faculty of North Carolina State University, was asked whether the failure to instruct the sentencing jury as to the consequences of non-unanimity would affect the jury's deliberations. He answered as follows:

> "My opinion is that the lack of [any knowledge on] the jurors' [part that a] non-unanimous verdict would result in a life sentence would have an effect on their deliberations, and I need to explain this a little bit further. In my opinion, the research on confirmity [sic], a substantial body of literature in social psychology, demonstrates that in a group setting, substantial conformity pressures exist. People exert pressures on others to conform their opinions to a majority. There are several classic experiments showing especially if you have a large majority and a very small minority, that majority can exert tremendous pressure on the minority to go along and conform. Now, in my opinion, the fact that, in my opinion, if a juror knew that a non-unanimous majority would result in a life sentence, and if that juror is for a life sentence, and the juror was in the minority, then that would give the juror considerable additional resources to stick by his or her position for a life sentence because the juror would know that after some reasonable amount of time, after enough time to complete their deliberation, if the juror still felt that way about a life sentence, then the jury return and tell the Judge they could not agree and a life sentence would be imposed. Without that kind of knowledge, the lone juror who is for life eventually, may be, not always, but may be swayed by the majority and conform, and change his or her opinion and go along with the death sentence."

(Transcript of Hearing on Motion for Appropriate Relief, pp. 575-576, testimony for the record only).

to avoid a situation in which no sentence would be imposed upon Petitioner at all. The introduction of such a "level of uncertainty and unreliability into the fact-finding process...cannot be tolereated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980).

Although this Court's death penalty decisions provide an adequate basis standing alone for invalidating the North Carolina death penalty scheme as applied in Petitioner's case, there is further precedent in an analogous area of the law which makes this result even more compelling in a capital case. In cases involving pleas of not guilty by reason of insanity, a problem similar to the one raised by Petitioner's case has arisen. In such cases, there has been concern that the jury's lack of knowledge as to the consequences of a verdict of not guilty by reason of insanity could unfairly cause the jury not to return such a verdict in a case in which it was warranted. The general lack of knowledge of the consequences of such a verdict among persons from whom juries are chosen could lead rational jurors to assume that such a verdict would return a defendant to the free world. Such is generally not the case, for with the return of such a verdict, most states, as well as the United States, require at least a minimal time of commitment to a mental institution. Because of these considerations, a growing number of courts have concluded over the last several decades that juries should be informed as to the consequences of a verdict of not guilty by reason of insanity. Departing from the general rule that the consequences of a verdict are irrelevant to the jury's considerations, these courts have determined that greater injustice can be done by allowing juries to reach verdicts based on false assumptions than by providing accurate information concering the consequences of their verdicts. See Lyles v. United States, 254 F.2d 725, 728-729 (D.C. Cir. 1957)(Burger and Prettyman,

Circuit Judges), cert. denied, 356 U.S. 961 (1958); Kuk v. State, 80 Nev. 281, 392 P.2d 630 (1964); People v. Cole, 382 Mich. 695, 172 N.W.2d 354, 363-366 (1969); Schade v. State, 512 P.2d 907 (Alaska 1973); State v. Babin, 319 So.2d 367 (La. 1975); Commonwealth v. Mutina, 323 N.E.2d 294 (Mass. 1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595, 601-604 (1976).

From these cases, the following principle can be drawn: where there is likely to be speculation by the jury about the consequences of the jury's deliberations, the jury must be given accurate information concerning such consequences, so that inaccurate information concerning these consequences does not divert the jury from rendering a true verdict. While the issue in these cases was somewhat different from the issue raised by Petitioner herein--in that the issue raised by Petitioner concerns the jury's speculation about the consequences of their failure to reach a verdict rather than about the consequences of their reaching a particular verdict--the principle is equally applicable to the issue raised by Petitioner. The fundamental flaw at play in both kinds of cases is the interjection of irrelevant considerations due to the jury's own speculation about the consequences of its deliberation. While none of these cases explicitly held that clarifying jury instructions must be given as a matter of due process, there is certainly ample precedent in this Court's decisions for converting statutory, "supervisory" requirements into due process requirements to insure the essential demands of fairness. See, e.g., Ham v. South Carolina, 409 U.S. 524, 526-527 (1973); Carter v. Kentucky, ___ U.S. ___, 101 S.Ct. 1112, 1116-1119 (1981). In any event, the teaching of these cases should be compelling in the context of death penalty cases, because "...fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they

do in the guilt-determining phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978).

In any death penalty case, the injection of irrelevant considerations into the jury's deliberations, as was done by the trial court's lack of instructions here, is highly prejudicial, but it is particularly prejudicial to a defendant such as Petitioner. The balance between aggravating and mitigating circumstances in Petitioner's case was very close. While the trial court instructed the jury to consider three aggravating circumstances and two mitigating circumstances (see footnotes 3 and 4 at p. 4, supra), three additional mitigating circumstances could also have been found by the jury, for the evidence clearly demonstrated their existence. While the proof showed that Ms. Barfield had previously been convicted once of forgery (DX-1 at 634), the proof showed no other prior convictions. Unquestionably, this demonstrated that she had no significant history of prior criminal activity, a statutory mitigating circumstance. G.S. §15A-2000(f)(1); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 615 (1979). Similarly, the evidence demonstrated repeatedly that Ms. Barfield was "under duress" during the time of the homicide. G.S. §15A-2000(f)(5). Ms. Barfield felt severely depressed and as a result, took massive quantities of prescription drugs every day in order to cope. (DX-1 at 625-628) Clearly a jury could have found Ms. Barfield to have acted under duress in these circumstances. Finally, the evidence showed that Ms. Barfield was an older person, (DX-1 at 594-595), and age is also a statutory mitigating circumstance in North Carolina. G.S. §15A-2000(f)(7). Because of the closeness of the question concerning appropriate punishment, therefore, any diversion of the jury into irrelevant considerations could have proved fatal for Ms. Barfield. This Court should see that the diversion described in this petition does not prove fatal for Ms. Barfield.

On the basis of the preceding analysis, Petitioner submits that the failure of the North Carolina death penalty scheme to inform the jury at her trial of the consequences of their inability to reach a sentencing verdict interjected irrelevant speculation about such consequences into her trial and resulted in an unreliable determination that she should die.

CONCLUSION

For the reasons expressed herein, the Petitioner, Margie Bullard Barfield, respectfully requests that this Court grant her petition for a writ of certiorari to the North Carolina Supreme Court.

September 8, 1981

Respectfully submitted,

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APPENDIX A

STATE OF NORTH CAROLINA

COUNTY OF ROBESON

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

Robeson County File # 78 CrS 4928
Bladen County File # 78 CrS 8262

STATE OF NORTH CAROLINA

vs

MARGIE BULLARD BARFIELD

J U D G M E N T

An evidentiary hearing was held on Monday, November 17, 1980 through Friday, November 21, 1980, with decision day on Wednesday, November 26, 1980. The defendant was personally present. She was represented by James D. Little, attorney of Fayetteville, North Carolina and Richard H. Burr, III, an attorney licensed in the state of Kentucky and appearing on behalf of the defendant through the Southern Prisoners Defense Committee of Nashville, Tennessee. The State was represented by Joe Freeman Britt, District Attorney for the 16th Judicial District and Donald W. Stephens, Assistant Attorney General of the State of North Carolina.

1. This proceeding was initiated by the filing of a Motion for Appropriate Relief on October 3, 1980 in the Superior Court of Bladen County. The case originated in Robeson County. Order for Change of Venue from Robeson County to Scotland County was entered on May 5, 1978. Order for Change of Venue from Scotland County to Bladen County was entered on November 1, 1978. Bladen County was the county for trial and for direct appellate review. A true bill of indictment charging the offense of murder in the first degree, with date of offense alleged as January 31, 1978, was returned at the March 28, 1978 Criminal Session of the Superior Court of Robeson County. The defendant was convicted by a jury of the capital felony

of murder in the first degree and was sentenced to death. Judgment was entered on the 2nd day of December 1978 in Bladen County.

2. Defendant appealed her conviction and sentence to the Supreme Court of North Carolina. On November 6, 1979 the Supreme Court of North Carolina found no error. It upheld defendant's conviction and sentence. State v Barfield, 298 NC 306 (1979).

3. Following the decision by the Supreme Court of North Carolina, the defendant petitioned the United States Supreme Court for a writ of certiorari. Her petition was denied on June 30, 1980. The defendant filed a petition for rehearing with United States Supreme Court, and rehearing was denied on September 17, 1980.

4. Defendant's execution date was rescheduled for October 17, 1980 by the operation of G.S. 15-194, after she exhausted appellate procedure for direct review.

5. Defendant is currently incarcerated at the North Carolina Correctional Center for Women in Raleigh, North Carolina .

6. The defendant is indigent and unable to pay the costs of these proceedings. Defendant has made independent arrangement for the employment of her present counsel, and the State of North Carolina is not obligated to pay for same.

7. A history of the sequence of motions and orders filed in this proceeding follows:

(a) Original Motion for Appropriate Relief, October 3, 1980.

(b) Motion to Amend Motion for Appropriate Relief, October 7, 1980. It was incorporated within the Order for plenary hearing.

(c) An Order for plenary hearing on the motion for appropriate relief of October 3, 1980, as amended, was entered on October 9, 1980, setting hearing date for November 17, 1980.

(d) An Order for the stay of execution of defendant through all

proceedings connected with the motion for appropriate relief in the trial division was entered on October 9, 1980.

(e) An Order for removal of the entire case, and for hearing on motion for appropriate relief was entered on October 9, 1980, removing the case from Bladen County back to Robeson County, the county of origin.

(f) An Order allowing the appearance as counsel of Richard H. Burr, III of the Kentucky Bar, under the provisions of G.S. 84-4.1, dated October 21, 1980, filed October 23, 1980.

(g) Motion for Information from the Supreme Court of North Carolina, dated October 24, 1980, filed October 27, 1980.

(h) Motion for Findings by the Court pursuant to G.S. 15A-1411 et. seq., dated October 24, 1980, filed October 27, 1980.

(i) Order Denying Motion for Findings by the Court pursuant to G.S. 15A-1411 et. seq., dated November 3, 1980, filed November 5, 1980.

(j) Order Denying Motion for Information from the Supreme Court of North Carolina pursuant to G.S. 15A-1411, et. seq., dated November 3, 1980, filed November 5, 1980.

(k) Petition for Writ of Habeas Corpus Ad Testificandum, dated November 5, 1980.

(l) Order allowing Writ of Habeas Corpus Ad Testificandum, dated November 6, 1980, filed November 7, 1980.

(m) A defense Motion for Discovery of Attorney's Files, with release and waiver by defendant dated November 6, 1980 was filed on November 7, 1980. Hearing on motion was held on November 17, 1980. It was allowed in part and denied in part as will appear of record.

(n) On November 6, 1980 the defendant filed a Motion for Leave to File Amended Motion for Appropriate Relief. Hearing was held on November 17, 1980. Motion was allowed. The document as filed is captioned "Amended Motion for Appropriate Relief".

(o) On November 11, 1980 the defendant filed a Motion to Amend Motion for Appropriate Relief. It was heard on November 17, 1980. Motion was

allowed. This amendment concerns itself only with paragraphs 18 and 26 of the "Amended Motion for Appropriate Relief".

Thus, the document captioned "Amended Motion for Appropriate Relief", dated November 6 and filed on November 7, 1980, and the document called "Motion to Amend Motion for Appropriate Relief", dated November 11, 1980 and filed November 12, 1980, together constitute the motion for appropriate relief which is the defendant's pleading upon which this hearing was held in the Superior Court.

(p) Pretrial, on November 17, 1980, the Court heard the State's Motion to Quash a defense subpoena for Donald W. Stephens, Assistant Attorney General of North Carolina. It was dated and filed November 17, 1980. It was allowed in part and denied in part. Although present throughout the trial, he was never called by the defendant to testify.

(q) On November 17, 1980 the Court heard the State's Motion, dated and filed on November 17, 1980, to Quash the Subpoena for the Chief Justice of the North Carolina Supreme Court. Motion to quash was allowed.

(r) The original and current Robeson County case number is 78 Cr 4928. The Bladen County case number is 78 Cr 8262. These two case numbers refer to the identical case and are all now jointly consolidated in Robeson County in 78 Cr 4928.

The Court finds that the defendant has alleged and contends that her constitutional or legal rights were denied or violated in each of the following respects:

8. Her court-appointed counsel failed to provide her with representation within the range of competency demanded of defense attorneys in capital punishment prosecutions at her trial and on appeal to the North Carolina Supreme Court. The specific allegations are that attorney Jacobson:

(a) Spent only 8-10 hours with the defendant during the 8½ months between his appointment and trial.

(b) Failed to present her at her trial as the complex, troubled, but sympathic figure that she is.

(c) Failed to interview and/or call numerous witnesses who were well situated to help explain the defendant to the jury.

(d) Failed to have the defendant fully evaluated by a psychiatrist or psychiatrists.

(e) The psychiatric testimony given on behalf of defendant at trial was fundamentally inadequate , in that such testimony:

(1) failed to reveal and discuss defendant's (probable) serious mental illness, which had potentially great defense and mitigational value;

(2) failed to describe and document the effects on the defendant of the drugs she had ingested at the time of the charged homicide, and

(3) completely glossed over a previously diagnosed psychosis from which defendant likely suffered at the time of the charged homicide, and that the psychiatric testimony offered on behalf of the defendant in the guilt phase of her trial had the effect of showing defendant to be sane and rational at the time of the murder with which she was charged.

(f) Failed to prosecute his motion for the appointment of additional counsel effectively.

(g) Failed to engage in the systematic exhaustive pretrial motion practice, which is necessary to the effective defense of capital cases.

(h) Failed to have defendant testify as to the effect her ingestion of a large quantity of drugs had on her capacity to appreciate the criminality of her conduct, or to conform her conduct to the requirements of law.

(i) failed to properly present his closing argument: "Counsel's closing argument on behalf of defendant in the guilt phase of her trial relied exclusively on testimony concerning the defendant's mental illness and ingestion of drugs to negate the element of defendant's intent in the charge of first degree murder. However, . . . counsel had presented no testimony on behalf of defendant concerning the effect on defendant's homicidal intent of such conditions." Paragraph 10(i).

(j) Failed to present in the sentencing phase any additional evidence concerning the defendant or the death penalty which could evoke feelings of mercy for the defendant, and failed to provide the jury with information during the guilt phase through which they could understand and empathize with the defendant, which resulted in a dehumanized and unavoidable view of the defendant as a coldblooded killer.

(k) Failed, in his closing argument in the penalty phase, to present any basis upon which the jury could exercise mercy, and himself succumbed to the dehumanized view of the defendant to which the defense case had contributed significantly.

(l) Failed to approach and consider a plea of guilty in a reasonable fashion.

(m) Failed to request jury instructions for the crime of voluntary manslaughter in the guilt phase.

(n) Failed to request a new jury for the sentencing phase, despite the admission solely in relation to guilt issues of proof that defendant murdered four other persons by means of arsenic poisoning.

(o) Failed to argue effectively or totally failed to raise numerous legal issues at defendant's trial and on appeal of defendant's conviction and sentence to the North Carolina Supreme Court.

9. Defendant was deprived of the right to a more reliable determination of guilt inhering in capital cases by the introduction at her trial of evidence concerning four homicides allegedly committed by her, but for which she was not charged. The specific allegations are:

(a) Defendant was indicted and tried solely for the murder of Stewart Taylor.

(b) The prosecution presented evidence that the defendant also murdered, by poisoning, John Henry Lee, Dolly Taylor Edwards, Lillian Bullard, and Jennings Barfield.

(c) Testimony concerning these other murders was admitted solely to show that Mrs. Barfield had the requisite knowledge to be convicted for the murder of Stewart Taylor, and that she acted pursuant to a common

scheme or plan. She contends that the prejudicial effect of this testimony outweighed its relevance, and that the admission of such testimony introduced a substantial factor of unreliability into her capital trial.

10. Defendant has been deprived of her right not to be a witness against herself by the admission into evidence at her trial of statements made by her to officers of the Robeson County Sheriff's Department while in the custody of such officers, without a voluntary and intelligent waiver of her rights. The specific allegations are Paragraph 12(a) through (d):

(a) "Mrs. Barfield was questioned on March 13, 1978 about the crime with which she was charged in the custody of two officers of the Robeson County Sheriff's Department."

(b) "On this occasion, Mrs. Barfield was substantially under the influence of drugs, was quite upset, and could not remember past events very well."

(c) "The testimony is uncontradicted that Mrs. Barfield was simply reminded by Officer Lovette that she 'still had her rights,' which had been explained to her three days earlier, and an incriminating statement was then taken from her."

(d) "Only after such statement was taken was Mrs. Barfield fully advised in writing of her rights."

11. Defendant has been deprived of the right to a more reliable guilt determination inhering in capital cases by the instructions to the jury at the close of the guilt phase of her trial concerning the elements of first degree murder and second degree murder. The specific allegations are:

(a) Of the four elements comprising first degree murder, the Court's instructions failed to distinguish clearly between two elements: malice and intent."

(b) Since intent is the only element not present in second degree murder, this lack of clarity is significant, for the difference between first and second degree murder thus becomes confused and unguided."

12. Defendant has been deprived of her right to due process by the trial court's instructing the jury in the guilt phase of defendant's trial that two factual elements of first degree murder -- premeditation and deliberation -- must be conclusively presumed because the murder was perpetrated by means of poison.

13. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the submission to the jury of three aggravating circumstances which were submitted at her trial. The specific allegations are:

(a) The aggravating circumstances submitted to the jury at defendant's trial were:

(1) the murder was committed for pecuniary gain,

(2) the murder was committed to hinder the enforcement of law, and

(3) the murder was especially heinous, atrocious, or cruel.

(b) The first and second aggravating circumstances, in the context of this case, apply to the same essential fact: The murder was committed to avoid prosecution for forgery.

(c) The third aggravating circumstance, by its application to the facts in this case, is likewise rendered useless as a guide to discretion, for its application here signals its application to every murder in which death is noninstantaneous.

14. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the trial court's numerous instructional errors concerning mitigating circumstances and the role they must play in the determination of a sentence. The specific allegations are:

(a) Failed to instruct the jury to consider the mitigating circumstances set forth at G.S. 15A-2000 (f)(1), in reference to no significant history of prior criminal activity, and in reference to

Section (f)(5) that defendant acted under duress.

(b) Failed to explain adequately the psychiatric mitigating circumstances set forth at G.S. 15A-2000 (f)(2) and (6), and failed to differentiate these circumstances adequately from the M'Naghten test of insanity.

(c) Failed to instruct the jury adequately concerning the existence of "other circumstances" having mitigating value.

(d) Failed to instruct the jury on the burden and standard of proof required for the proof of mitigating circumstances.

(e) Failed to instruct the jury to give independent weight to the mitigating circumstances, and instead , instructed the jury in such a way that the mitigating circumstances were confined to a role of simply outweighing aggravating circumstances, in the absence of which a death sentence was required.

15. Defendant has been deprived of her right to the guided exercise of jury sentencing discretion in a capital case by the failure of the trial court to instruct the jury at the sentencing phase to disregard all proofs of homicides committed by the defendant, other than the Taylor homicide. The specific allegations are:

(a) The testimony concerning the homicides committed by the defendant, other than the Taylor homicide, was admitted solely because of its relevance to defendant's intent to kill Taylor and to her knowledge of the effects of arsenic on human beings.

(b) The "other homicides" testimony was not admitted to prove that defendant was a "mass murderer".

(c) While such testimony could not, therefore, be weighed in relation to defendant's culpability, it nonetheless became a factor in determining defendant's culpability, because the district attorney argued in the sentencing phase that the jury should remember that the Taylor murder was the fifth in a series of murders committed by defendant.

16. Defendant has been deprived of her right to be protected from

an unreasonable and arbitrary verdict by the trial court's instruction to jurors that their recommendation must be unanimous and by the trial court's simultaneous failure to advise the jurors of the consequences of their failure to reach a unanimous verdict as to sentence.

17. Defendant has been deprived of her right to be protected from an unreliable and arbitrary verdict by the trial court's inaccurate, misleading summary of defendant's proof in its charge to the jury at the end of the sentencing phase of the defendant's trial. The specific allegations are that the trial court:

(a) Repeatedly implied that defendant's proof conceded that the homicide of Stewart Taylor was an intentional killing.

(b) Repeatedly confused the defendant's proof concerning her mental illness with her proof concerning the effect of drugs on her mental state, never stating the two as distinct problems, each having an effect on the other.

18. Defendant has been deprived of her right to a representative, impartial jury, reflective of contemporary community values by the exclusion of prospective jurors for cause solely on the basis of their opposition to capital punishment. The specific allegations are:

(a) Eleven prospective jurors, jurors Nye, Williams, Patrick, Benjamin, Dent, Rosher, Grimes, McKoy, Andrews, Allen, and Perkins were excluded from serving on defendant's jury solely because of their opposition to capital punishment.

(b) Juries from which death-scrupled jurors have been excluded, in addition to being nonrepresentative and nonreflective of contemporary community values, are not impartial on the issue of guilt, but are prosecution prone and more likely to convict than are juries in which death-scrupled jurors are included.

19. Defendant has been deprived of her right to an impartial jury by the exclusion for cause of juror Dent, who despite expressing general opposition to the death penalty, never stated that he was irrevocably committed to vote against it. The specific allegation is: The voir dire examination

of juror Dent.

20. Defendant has been deprived of her right to have the North Carolina Supreme Court review her sentence to determine whether it is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The specific allegations are:

(a) In reviewing her case on appeal, the North Carolina Supreme Court failed to conduct a proportionality review of Mrs. Barfield's sentence.

(b) While G.S. 15A-2000(d)(2) requires proportionality review, the North Carolina Supreme Court has taken none of the steps necessary to implement this provision of the statute --- e.g., the Court has set up no mechanism for gathering sufficient data about capital cases upon which proportionality review can be conducted, and the Court has done nothing to define the pool of cases from which "similar" cases will be drawn for proportionality review.

21. Defendant has been deprived of her right to be tried and sentenced by a process free of arbitrary decision making in violation of G.S. 15A-2000(d)(2). The specific allegations are:

(a) The race of the victim is the prime determining factor for whether a capital defendant is sentenced to life or death in North Carolina.

(b) Since the effective date of the current death penalty statute, June 1, 1977, 16 people have been sentenced to death, and there have been 19 murder victims associated with these 16 people.

(c) Of the 19 victims of death sentenced defendants, 17 or 89.4% have been white and only two or 10.6% have been black.

(d) No other demographic characteristic is even close to race of the victims as an "explainer" of death sentences in North Carolina.

22. Defendant has been sentenced under a statute, G.S. 15A-2000 et. seq., which is unconstitutional, in that G.S. 15A-2000(d) grants expanded jurisdiction to the Supreme Court of North Carolina without a constitutional

amendment, and is in effect, a violation of Article IV, Section 12 of the North Carolina Constitution.

23. It is alleged that defendant's conviction and sentence must be vacated and set aside on the basis of newly discovered evidence, which has a direct and material bearing upon the guilt or innocence of the defendant, and upon the determination of defendant's sentence. Such newly discovered evidence includes, but is not limited to, the following:

(a) evidence that defendant was insane under any legal test of sanity at the time of the charged murder, and

(b) evidence that would have had substantial mitigating value.

24. The North Carolina Supreme Court failed to review the record in defendant's case to determine whether the sentence was imposed in an arbitrary manner, in violation of G.S. 15A-2000(d)(2). While the Court purported to conduct such a review, it failed to review the issues set forth herein. Each of these issues injected an element of arbitrariness into the process by which Mrs. Barfield was sentenced to death.

The defendant, who is the petitioner, offered evidence. The State offered no evidence. A summary of the facts as found by the Court follows:

25. Robert Dale Jacobson of the Robeson County Bar, Lumberton, North Carolina was the attorney representing the defendant in all the original trial and appellate proceedings, and is the attorney whose competency is now being challenged by the defendant.

(a) Mr. Jacobson was graduated from the University of Iowa, School of Law in June 1967, and was admitted to the Bar in Iowa in June 1967. Thus, at the time of the trial complained of, he had been licensed for 11 years. On September 15, 1967 he entered military service as a judge advocate. In time he worked as both prosecution and defense counsel. No capital cases were prosecuted or defended while working as a judge advocate. From November 1971 until August 1973 he worked as an Assistant Attorney General of the

State of Iowa. His primary duties were with the Criminal Appeals Division in the Supreme Court. For 9 months he was head of the Criminal Appeals Division. As Iowa had no capital punishment statute, then or now, he handled no capital punishment cases in Iowa.

(b) Mr. Jacobson came to Lumberton North Carolina about August 1973. Initally, as he was not licensed here, he worked in the nature of a paralegal to the lawfirm of Johnson, Hedgpeth, Biggs & Campbell. In May 1974 Mr. Jacobson was licensed to practice law in North Carolina, by reciprocity. He started courtroom practice in May 1974. Thus, he was licensed in North Carolina four years prior to the trial of this case. Originally, approximately 40% to 50% of his practice was criminal. It is now over 50%. He has been on the list for court-appointed cases from the beginning. At the time of his appointment to this case it was the rule that a local attorney took all of the cases each week in the Lumberton District Court wherein the judge had found the defendant to be indigent, and had assigned counsel. It was "his week", and he was appointed by the presiding judge, Charles G. McLean, of the District Court to represent Margie Bullard Barfield on the 14th day of March 1978.

(c) Although this was Mr. Jacobson's first capital case, it was not his first murder case. James Carmichael was successfully defended by him on a charge of murder in the first degree, with a verdict of not guilty. His second case of murder in the first degree involved a female juvenile, age 11 or 12. Under the North Carolina law her case was handled in the Juvenile Court Division, and she was committed to a training school. On August 21, 1978 Mr. Jacobson was court-appointed to represent Daniel Webster Wilkens on the capital charge of murder in the first degree. On November 17, 1978 he was court-appointed to represent Vincent Johnson on the capital charge of murder in the first degree.

(d) This being his first capital case meant that he would and did work and try harder than in other cases. He had no trouble in talking with his client and understanding her. He discussed with her the use of drugs, the chance she might be convicted of second degree murder, and discussed

mitigating and extenuating circumstances. He talked to doctors, psychiatrists, pharmacists, family members, other attorneys and his own Aunt Margie, who is a psychiatrist, in order to get backgrcund information and to prepare his case. He talked to the psychiatrists by telephone, and wrote letters to them about his client, and talked with them at trial. He talked with the defendant at the jail, at Dorothea Dix Hospital, in the days preceding trial, and throughout the week of the trial itself. He talked to her in District Court on the same day of his appointment.

(e) He decided who to call as witnesses based on the witness and his own experience, and in consideration of this being a capital case. His purpose for her testifying was to show that she took all of those drugs, that she was a poor person, that she had to struggle to get by, that she had seen many doctors, that medicines had been over prescribed, and that she took them against their wishes and in combination, that she was using her doctors, and that considering he was able to get into evidence some 40 or 50 pill bottles belonging to the defendant, he felt that he had done well on all of this on direct examination that was presented to the Court.

(f) He made the decision to put her on the witness stand. She had repeatedly said to him that she had no intent to kill, and that he wanted the jury to hear and know this from her. They discussed and practiced her testimony several times and days. He counseled her to be a sympathic witness, to look like somebody's mother, to evoke sympathy for herself, to help herself, not to get into any arguments with the district attorney on cross-examination, and to cry. On the witness stand she wanted to argue about the cause of death and that she did not intend to do it. She got into an argument with the district attorney.

(g) He knew that the district attorney was going to try to get into evidence all of the other deaths, and he was familiar with the law. He got a copy of all her statements and all the death certificates.

(h) He engaged in plea bargaining, and offered the district attorney five back-to-back sentences. The district attorney turned him down in all of these discussions. He sought assistance of an in-law of the victim

but was unsuccessful. He sought a plea through the assistance of Judge Hamilton Hobgood, who heard some of the pretrial motions, but no agreement could be reached by those involved.

(i) She would not enter an open plea, and neither would he enter an open plea of guilty to a capital offense absent a plea bargain. It was her feeling and his feeling that she had not intended to do this, and they had a good shot at second degree murder.

(j) His attempt at eliciting jury sympathy failed.

(k) At the end of the district attorney's jury agrument, he was told that his client gave a "silent" slap of hands of approval and he reprimanded her for it. She never gave the impression that she wanted forgiveness --- that she never cried at any time. His belief is that if she had followed his counseling, she would have gotten a life sentence.

(l) He engaged in pretrial motion practice. He personally talked to the investigating officers outside the presence of the district attorney without any interference from the district attorney and the officers were very candid with him. He did not ask for an investigator. He did not make a "Brady" motion. What the district attorney did give him was exculpatory in nature.

(m) He made a motion for psychiatric evaluation, defendant's exhibit 5, and the defendant was committed to Dorothea Dix State Hospital.

(n) He made a motion to request additional counsel, defendant's exhibit 7. He orally asked Superior Court Judge Hobgood for additional counsel about the time of arraignment. This was not put on the record because he knew his record was protected from the District Court.

(o) He made a motion for expert witnesses and payments of fees, defendant's exhibit 8.

(p) He knew that an SBI handwriting analysis expert would testify. That he did not ask for a handwriting expert because he knew the defendant would, and did, testify that all signatures on the questioned documents were written by her while she was under the influence of drugs, and therefore, he did not feel it necessary to get a handwriting expert.

(q) He did not ask for information by discovery of the other four deaths because no charges existed in the other four cases. He did get the death certificates of those four.

(r) He made a motion for individual voir dire of the jury and sequestration of jurors during the voir dire, defendant's exhibit 12.

(s) He made a motion for complete recordation of all proceedings, defendant's exhibit 22.

(t) He made a motion for change of venue, defendant's exhibit 10.

(u) He made a motion to supress the statement or confession of the defendant, defendant's exhibit 14. The motion to supress was heard during the trial, and this was the usual procedure.

(v) He made a motion for an independent psychiatrist, defendant's exhibit 15.

(w) He filed a motion giving notice of psychiatric defense.

(x) Pursuant to his motion, he was able to take during trial the deposition of Dr. Sainz at the Cape Fear Valley Hospital in Fayetteville. As both the original decision in the North Carolina Supreme Court and evidence at this evidentiary hearing shows, Dr. Sainz later died.

(y) He made a motion for a continuance of the trial so as to get Dr. Sainz into the courtroom to testify.

(z) He did not make a motion to have Judge Henry A. McKinnon, Jr. recuse himself. He wanted Judge McKinnon in this case.

(a.a.) He did not consider filing a motion to declare G.S. 15A-2000 unconstitutional.

(b.b.) No motion was made calling for a probable cause hearing.

(c.c.) He did not consider a motion for a bill of particulars in order to find out about the aggravating circumstances the district attorney relied upon. He did not consider the use of a habeas corpus to get other evidence of the other four deaths. He did not ask for a list of the State's witnesses. He did not file a motion for speedy trial because he felt he was responsible for all of the delay and even at trial moved for one more continuance for Dr. Sainz to testify.

(d.d.) He did not file a challenge to the array. He did not file a motion in limine because he did not consider it appropriate. He did not file a motion to sequester the jury, nor any motion to ask the court to increase the number of peremptory challenges for the defendant. Regarding the Feratta decision, he did not feel that the defendant wanted to be co-counsel. He did not contact any organization to give him assistance at the trial, but did talk with other people for their thoughts and ideas, such as attorneys in Robeson County and Bladen County and with people in the clerk's office in Bladen County. He got a copy of the Jerry Paul jury selection transcript in a major case in Fayetteville. He got materials on capital cases from the North Carolina Trial Lawyers' Association.

(e.e.) He did not have the three psychiatrists testify in the penalty phase because he had already had them testify in the guilt phase. He knew that their testimony would be considered on all of the phases, and it didn't matter when they testified. He wanted the jury to know that the psychiatrists had placed a label on her condition, and by the evidence of problems to which the psychiatrists would testify he could build a psychiatric defense about drug abuse, and he thought he would be remiss if he did not use all three psychiatrists. He had enough trouble getting them to court to testify once.

(f.f.) He did not look at her file at the Southeastern General Hospital or at Dorothea Dix Hospital. He did not intend to call any other witnesses in the sentencing phase because he called the ones he did and the ones he wanted.

(g.g.) Mr. Jacobson's belief is that if Margie Bullard Barfield had followed his counseling, they would have gotten her off with a life sentence.

26. Dr. Arthur Eugene Douglas, a psychiatrist at the Southeastern General Hospital in Lumberton, North Carolina, testified as to his examination of the defendant, and the results of his evaluation in 1978. He discussed the records and sources available to him for background information and told of

his diagnostic opinion. He did not perform or cause any tests to be performed in his examination. He did confer with attorney Jacobson after his examination.

27. Dr. Bob Rollins, a medical expert in the field of forensic psychiatry, testified about his examination of the defendant at Dorothea Dix Hospital in Raleigh in 1978. He discussed the psychological tests given there, his own examination and feelings, the medication given to her while a patient, that she would not cooperate with him, and that he did not have any other evidence which would have been beneficial to the defendant in the sentencing phase. She had given him a statement of the events of the alleged crime which was not in his report, but which he felt he did not believe, and it would not be beneficial to the defendant to relate at court. The results of the Rorschach test given at Dix would indicate that the defendant would deal with tension by action, rather than reflection.

28. Jesse Bullard testified that he is a brother of the defendant and now lives in Bishopville, South Carolina. He was present at the trial of the case. He talked to attorney Jacobson at least once, and thinks it was over the telephone, and was present at the arraignment and talked to a number of the family who were then present. The attorney mentioned what his plans were at that time, but he cannot now recall them. He doesn't believe he saw the defendant in 1977 and early 1978. He discussed their family background through the early years and on up through the '70's, and that as he recalled, Thomas Burke, the defendant's first husband, had a problem with alcohol during his last three years.

29. Dr. Selwyn Rose, now of Winston-Salem, North Carolina, testified as an expert in the field of forensic psychiatry. He has been practicing medicine in the field of psychiatry since 1967. He is also a lawyer, licensed in California in 1974 and in North Carolina in 1980. Before coming to North Carolina, his practice was in Los Angeles, California. He moved to North Carolina in May 1978.

On September 13, 1980 he conducted his own evaluation concerning this case and made an examination of the defendant which lasted by interview for approximately 2-2½ hours. In the interview she admitted poisoning several people, whose names were given. He performed four psychological tests: Wechsler Adult Inteiligence, Minnesota Multiphasic Personality Inventory, Rorschach and Bender-Gestalh.

After discussing his evaluation and findings, on direct examination Dr. Rose was asked this question: "Dr. Rose, do you have an opinion satisfactory to yourself as to whether Mrs. Barfield was sane or insane at the time of the commission of the murder of Stewart Taylor?" Answer: "My opinion is that she was not sane, in that I am uncertain as to whether she was sufficiently disturbed to reach the level of impairment which I consider to meet the insanity test." On cross-examination he was asked the following question by the district attorney: "Dr. Rose, you are not telling this court, are you, that based on a two hour interview with the defendant and your examination of testimony and files, that you have an opinion satisfactory to yourself to a reasonable certainty, scientific and medical certainty, that Margie Barfield at the time of the poisoning of Stewart Taylor understood the nature and consequences of her act and knew that it was wrong, you are not saying that, are you?" Answer: "No sir."

30. D. N. Geddie of Fayetteville testified that he had known the defendant for a number of years, that he was the manager of the Belk store in Tallywood Shopping Center in Fayetteville, had been with Belk's for 17 years, and that the defendant worked for Belk's for several years from 1964 until 1971.

31. Rev. Hugh E. Hoyle, pastor of Trinity Pentecostal Holiness Church of Blue Ridge Road in Raleigh, testified that he has been a minister for 18 years, has counseled people about their problems, and has counseled about drug problems and other matters. He first met this defendant in August 1977 in Woman's Prison. He has now been her pastor for over one year. (Defendant's counsel at this hearing said that the testimony of Rev.

Hoyle was a part of their showing under Lockett regarding community support.)

32. Mary Ann Tally testified that she is a licensed lawyer admitted to the North Carolina Bar in August 1974. She is the public defender for the 12th Judicial District. Following law school in 1974, she was first employed as an assistant public defender for the 12th Judicial District, and has been the public defender by appointment of the Governor since June 1976.

She has tried three capital cases that went to the jury on the question of life or death. She argued all three of them herself. Two of them were convicted, given the death penalty, and are now on death row; Steven Silhan and Norris Taylor. In the third case of James Alonzo Powell, the jury returned a recommendation of life imprisonment. Of her seven capital cases to which she was originally appointed, the families hired other counsel in the remaining cases.

She is opposed to capital punishment.

Mrs. Tally feels that the defendant, Barfield, did not have adequate representation at her trial.

In the opinon of Mrs. Tally, attorney Jacobson should have engaged in systematic motion practice, which he did not, and that there are about 12 motions that he should have made in order to have represented the defendant effectively. She discussed each of them. They are: He should have:

(1) Filed a motion to prohibit death qualification of potential jurors. This is one of the revolving issues across the country.

(2) Filed a motion for separate jury to determine guilt or innocence and death or life.

(3) Filed a motion to challenge the composition of the grand and petit jury.

(4) Filed a motion for the court to appoint an independent psychiatrist for the penalty phase.

(5) Filed a motion to grant him funds to employ a psychiatrist for the penalty phase who could talk to the jury about her problems and relate them to the mitigating factors.

(6) Requested any statements by the State's witnesses, specifically a "Hardy" motion, which he should have used for cross-examining

the State's witnesses.

(7) Filed a motion for a bill of particulars and required the State to set out the aggravating circumstances relied upon.

(8) Filed a motion to disclose all information relating to sentencing, including exculpatory and mitigating factors.

(9) Filed a motion to be allowed to have the defendant participate as co-counsel.

(10) Filed a motion to allow her a right of allocution, if his motion to have her appear as co-counsel was not granted.

(11) Filed a motion declaring G.S. 15A-2000 unconstitutional on its face and as it related to the facts of this case.

(12) Filed a motion for sequestration of the jury.

(13) Filed a motion in limine. After the call of the case for trial, he should have sought to restrict the use of the evidence concerning the other poison deaths. And he should have renewed his motion in limine for protection at every possible opportunity.

In the opinion of Mrs. Tally, Mr. Jacobson was ineffective in his handling of his motion to supress the confession.

In Mrs. Tally's opinion, Mr. Jacobson was ineffective in the handling his motion for change of venue from Scotland County to Bladen County.

In Mrs. Tally's opinion, Mr. Jacobson was ineffective in the handling of his motion for continuance because of the unavailability of Dr. Sainz to testify at trial.

In the opinion of Mrs. Tally, Mr. Jacobson was ineffective in failing to present evidence to support his various motions which were made, and that the lack of such, undercut on its face any effective presentation, and it wound up as being a presentation in a vacuum, and that he failed to make a proper showing that he was not competent to handle the case by himself when he appeared before either Judge McLean or Judge Hobgood.

She further testified that in her opinion the evidence presented by Mr. Jacobson during the penalty phase was very poorly handled; that essentially no evidence was brought out about her background and her humanness. That the

evidence presented at the penalty phase concerning her mental state was not effectively presented in any manner whatsoever. That no motions were made to the Court to request a new jury for punishment, and that it was absolutely essential to have been done in this case because of the way the motion to supress the confession had been handled. That because of his poor handling of motions practice, the jury had been tainted during the evidence presented in the first phase, and so were tainted in the second phase of the trial. That the evidence offered in the guilt phase was completely improperly handled for reason that he had called a number of doctors after a plea of not guilty by reason of insanity, after he knew that those doctors would say that she was sane, and that this gutted his defense completely. That in her opinion he failed to protect the rights of the defendant during the argument by the district attorney in the guilt phase. That in her opinion he should have requested several instructions by the judge to the jury; that he made no real effective argument regarding the defense of insanity; that he failed to request the judge for instructions that the presumption of premeditation and deliberation was not absolute; that he failed to request instructions and proper instructions for murder in the second degree and voluntary manslaughter; that he failed to handle himself properly on the instructions conference by failing to make a motion for a recorded conference, and by the subject matter he discussed in the conference; that he failed to request an instruction regarding a nonunanimous verdict in the punishment phase; that his argument to the jury during the penalty phase was poorly handled, and that he failed to make a cogent argument to the jury as to why they should return life instead of death; that in her opinion his conduct on the jury voir dire on the whole was very ineffectively handled; that in her opinion he did not provide the defendant with effective assistance of counsel.

In her opinion, if Mr. Jacobson had done all those things mentioned by her, she doesn't know that the results would have been any different, but at any rate, the defendant would have had a much better chance and would have had

a fair trial. Mrs. Tally did not do all of these things, motions and the like, in her Silhan case because each case is considered as an individual case. She cannot recall if she filed all of the 12 motions mentioned in the Silhan case, but she filed some of them, and all that she could dealing with that particular case. That she hopes she did her best in the Silhan case, and that Silhan went to death row. That in the Norris Taylor case she hopes she did all she could to save his life. He is now on death row. In her expert opinion, she disagrees with the statement in the reported decision by the North Carolina Supreme Court in this case, 298 NC 319, that Mr. Jacobson had rendered "high quality representation" to Mrs. Barfield. All that she had to work from is the testimony in the record of the original trial. She was not at the original trial. She has read the motions and orders of the court and the two volumes of the trial transcript.

33. Mr. John Ackerman testified that he lives in Houston, Texas and is the Dean of the National College of Criminal Defense. His law degree is from the University of Wyoming, and he was licensed there in 1967. For several years he practiced law in Wyoming, and organized the first public defender system in Wyoming.

His experience with capital cases is having had three cases which potentially involved capital punishment. One case resulted in the death sentence in Wyoming. On appeal he was able to get the Wyoming death penalty statute declared unconstitutional.

He is the editor of a publication started in September 1980 called Death Penalty Reporter. His college is now doing seminars on defending death penalty cases around the country. He was tendered, and held, to be an expert in criminal defense standards nationally. Subsequently, he was tendered, and held, to be an expert in the area of the evaluation of the competency of counsel in capital cases and an expert in the area of trial strategy and technique in criminal cases. No relevant opinion evidence came out as direct evidence. Many answers were given, which under the rules of evidence and the law, and the objections by the State, were recorded only for the record proper.

34. Horace Parnell testified that he has lived in Parkton and has known the defendant for 20 years or more. She moved into the community and married. Prior to 1969 when he first knew her, she was a very fine person and taught the Sunday School class. From 1969 to 1978 he did not see her too often during that period of time.

35. Nellie Wallace testified that she lives in Parkton and has been employed for a number of years with Belk's at Cross Creek Mall. She used to work at the Belk store in Tallywood from 1964 until 1975. She has known the defendant for 35 years and they worked together at Belk's. Their children visited in high school and up to about the year 1972. She did not volunteer to go to see Mr. Jacobson or any family member during the trial. She was never asked. She does not know what she would have done if she had been asked to be a witness in the original trial.

36. Dan Proctor testified that he is in the wholesale nursery business and lives in Parkton. He has known the defendant for 25 or 30 years. Mr. Jacobson never asked him to testify. He was available if he had been asked. During the 1960's his contact with the defendant was as any child in the neighborhood. He did not see her real often, but around town. She once lived across the street from him. His contact in the 1970's was like always, living across the street from her and in his area. They did not go to the same church. He saw her as any of his friends in Parkton. He did not notice any change in her while he knew her. In the 1970's she was always a fine person. He had no reason to make it known that he would testify.

37. Tommy Furmage testified that he is a farmer in the Parkton community and has known the defendant for 30-35 years. Mr. Jacobson never asked him to testify, but he was available to do so if asked. He thinks his wife is the only person that he told this to. It was general knowledge in his community that he would have testified if he had been asked. His contact with her in the 1960's was that he would see her at church and sometimes two or three times during the week in person. He always thought she

was a very nice person in his community.

38. James Teague testified that he lives in Fayetteville and works for Burlington Industries at its Raeford plant as supervisor of spinning. He knows the defendant and she worked under him in the late 1950's and early 1960's.

39. Wade Holder testified that he lives in Fayetteville and has known the defendant since 1953. When he was a teacher in the Parkton Public School System he lived with the defendant's parents for four years and that the defendant was in and out of the home three or four times a week. He never talked to Mr. Jacobson. He was available to testify if asked.

40. Linda Faye Paul testified that she lives in Charleston, South Carolina and is a sister of the defendant. When the witness was three years old, the defendant was married. She saw the defendant daily until the 1970's and considered the defendant a very good loving person, a dedicated mother and saw her relate to others. The only time she had any contact with attorney Jacobson was at the first hearing, in a small room where they were together with her sister, the defendant. She never spoke to the attorney directly and would not have known him unless he had been pointed out to her yesterday.

41. Cathy Anne Middendorf testified that she was a student at North Carolina State University and was a teaching assistant in social psychology. Defense counsel stated that they were not offering her as an expert. Not a scintilla of direct evidence was elicited from this witness relevant to any issue on trial in this case. This witness was excused by the defense counsel, to be allowed to be recalled at at a later time. This witness was subsequently discharged by the defense counsel without ever being returned to the witness stand. No evidence was ever elicited.

42. Dr. James Luginbuhl testified that he has a PhD in social psychology from the University of North Carolina. He is employed by North Carolina State as an associate professor of psychology. He is a member of

of numerous societies and has published numerous articles in the socio-psychology field. He was tendered, and held, to be an expert in the field of social psychology. Although he testified concerning research and his experience, there was no relevant direct evidence elicited in this case. Various questions and answers were recorded for the record proper only.

43. James O'Reilly testified that he is employed as a doctoral candidate in the field of sociology and demography, and has a Masters Degree in sociology from Duke University and lives in Durham. For four or five years he has been gathering and analyzing representation of various jury pools in North Carolina and elsewhere. He was tendered as an expert in jury study in North Carolina. The State objected and the Court sustained the objection. No relevant direct evidence was elicited from this witness.

44. Ronald Burke testified that he is the son of the defendant and lived with her growing up in the Parkton community. That his relationship with his mother was everything that you could ask for as a mother. That she saw to it that he and his sister attended church every Sunday and that she kept the family together. About 1967 his father began drinking and the atmosphere around the house was not good. There was a lot of fussing and arguing by the father. The father died in 1969. He went into the army in 1971 but received a hardship discharge in April 1973 in order to be at home with his mother. About six or seven months later, he left and was married. Thereafter his relationship was good but it was different, and he had a fight to help her get off excessive medication. He discussed the trial with the attorney, Mr. Jacobson, and first saw him at arraignment. Later he met him in his office. He was told of the charges and the consequences. The attorney asked him if there was anything he needed to know of his mother, that he said yes, and told him of her taking drugs excessively. The attorney never discussed the background of his mother prior to the time of taking drugs. He testified at the trial. He worked as hard as any family member with the attorney and attorney Jacobson complimented him several times

for his help. He testified on the hearing on the voir dire to supress the confession. He testified in the guilt or innocence phase. He testified in the punishment phase.

45. Kim Norton testified that she lives in Lumberton and that the defendant is her mother. Growing up they had the best mother and daughter relationship possible. The defendant was there supporting her in school functions and in church. There was a good marriage until 1967 when her father started drinking heavily and arguing. Her mother had worked at Burlington Mills in Raeford and Belk's in Tallywood. Later the witness moved to South Carolina. The witness had one child who was age three years at the time of trial. After she moved back to Parkton she had several arguments with her mother about taking pills and destroying herself. She was different in those later years, depressed and just changed a great deal, and was not the same person. She talked to attorney Jacobson at arraignment, and on Friday or Saturday before the trial and on Monday of trial. They discussed the defendant's drug problem. The attorney did not ask her about any background, other than the drug problem, or about any people in the Parkton community. That she has gone over her present testimony for this hearing a couple of times with present counsel. She was a witness in the guilt or innocence phase of the trial. That she testified that oridinarily she would not leave her daughter with her mother, the defendant, for that she was afraid.

46. Dr. Harmon L. Smith, Jr. of Durham testified that he is a professor at Duke University teaching in the field of ethics and moral philosophy. He was tendered, and held, to be an expert in the field of ethics. He talked to the defendant approximately one week ago today for a first time, and his purpose was that he wanted to interview her before testifying. That he was not with her long enough to establish firm conclusions, but he does have impressions from the interview. No relevant evidence was elicited on direct examination from this witness to any of the issues in the motion for appropriate relief. Various questions and answers appear only for the record proper.

47. James Alex Bullard testified that the defendant is his sister; that he is pastor of Mt. Calvary Baptist Church; that they had a close relationship growing up, and was together with her for 16 years. He was close as a brother and sister could get. He loved her more as they grew older. He knew her first husband, Thomas Burke, and in the early 1960's there was a close relationship because of the children. Later Mr. Burke drank, and died about 1968. In the 1970's he saw her approximately once a month. While she was in jail awaiting trial, he saw her two or three times and she seemed to be more like herself in the earlier years. He knew she was taking medication about the time of the incident which gave rise to this case.

48. Barry Nakell testified that he is a professor of law at the University of North Carolina School of Law, Chapel Hill. That he graduated from the University of Illinois School of Law in June 1966. That he served as law clerk to the former Chief Justice Roger Traynor of the California Supreme Court. In the academic year 1974-75 he was on leave of absence and worked as public defender in Washington, DC. He has published numerous legal articles; he has received a grant from the National Science Foundation, and in collaboration with others is in current research on the death penalty in North Carolina. His collected data concerns itself with homicides in North Carolina from June 1, 1977 through May 31, 1978. His purpose in gathering this data is to make a broad and deep study of homicide in North Carolina and to study the exercise of discretion in death penalty cases. His research is now well under way. He is subjecting it to computer analysis; and they will try to use an analysis that looks at multiple variables. Among his inquiries is to seek answers as to what motivates the death penalty decision. He hopes to have the analysis report complete and ready by the end of "next summer". No opinions or conclusions were offered by this witness. No direct evidence was obtained from this witness relating to this case.

49. At the completion of all oral testimony, the defendant offered

into evidence the following exhibits: #26, #27, #9, #12, #5, #6, #7, #8, #22, #10, #16, #14, #15, #25, #19, #18, #17, #11, #21, #29, #30. State's exhibit #1 was received into evidence at the outset without objection by either side.

50. Defendant's exhibit #20 had been marked for identification, but was not offered into evidence. However, after all of the evidence had been closed, and after all of the arguments had been closed, counsel for the defendant for a first time asked to introduce defendant's exhibit #20 into evidence. The State objected. The Court sustained the objection.

51. On the first day of the hearing, Mr. Little, counsel for the defendant, stated: "Your honor, I would ask the Court and the State's indulgence in one brief statement that I indicated to Mr. Jacobson that I was going to make at the beginning of his testimony, and that is, that we do not contend Mr. Jacobson is not a good attorney in general, and that he does not have a good reputation in this community as an attorney. Our sole source of inquiry is as to his effectiveness of counsel in this particular case and as to the allegations that were made in the motion for appropriate relief. Thank you, sir."

52. The defendant did not testify. She was personally present throughout the entire hearing.

After a consideration of all the competent evidence offered, and after having seen and observed all the witnesses on the stand, and after determining what weight and credibility to give to the testimony,

THE COURT CONCLUDES AS A MATTER OF LAW:

1. The principal challenge by defendant in this evidentiary hearing revolves basically around whether her counsel for the original trial and appellate review was competent. The charge is that defendant has been deprived of her right to effective assistance of counsel "because counsel . . . failed to provide her with representation within the range of competence demanded of defense attorneys in capital punishment prosecutions."

2. "The proper standard for determining the effectiveness of counsel" is stated in Marzullo v Maryland, 561 F. 2d 540, 543 (Court of Appeals 4th Circuit, 1957) as a question: "Was the defense counsel's representation within the range of competence demanded of attorneys in criminal cases?" "By this standard," the Court explained, "Effective representation is not the same as errorless representation. An attorney may make a decision or give advice which in hindsight proves wrong. Such errors . . . are not necessarily grounds for post-conviction relief." Marzullo, p. 544.

3. The burden of proof in a motion for appropriate relief is upon the defendant. To meet this burden "a convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance, rather than from informed professional deliberation." Marzullo, p. 544. The Court "measures an attorney's conduct by comparison with the competence generally found in the profession;" and it "requires an objective assessment of counsel's adequacy." Marzullo, p. 544. While the "standard does not list the things counsel should or should not do, it does not preclude resorting to specifics for acertaining the range of competence demanded." Marzullo, p. 544. It is generally required that an attorney:

(1) must be appointed promptly,

(2) have reasonable opportunity to prepare,

(3) must confer meaningfully with client,

(4) must conduct appropriate investigations, and

(5) must be allowed time for reflection and preparation for trial. (See Marzullo, p. 544.)

4. Monday morning's reflection by this Court of the events of the previous Friday, the last day of evidence and arguments, brings to mind certain matters which should serve to illustrate some of this Court's reasoning behind its ultimate results.

(a) After all the evidence had been closed, and after the "two" present counsel for the defendant had presented numerous exhibits into evidence, each exhibit having been marked earlier and used only for identification, and after all arguments for counsel had been heard and closed, and as the Court was about to recess over the weekend, for a first time counsel for the defendant moved to introduce defendant's exhibit #20 (a booklet on "How to Try a Capital Case") into direct evidence. The State objected. The Court sustained the objection. In effect, the Court did not use its discretion to allow defense counsel to reopen the case and present evidence.

Whether this omission was an oversight of counsel, or a strategy of counsel, is speculative. Ordinarily this Court would willingly treat it as an oversight. But calling it as an oversight only serves to demonstrate that even when a defendant has "two" attorneys instead of "one", there is no guarantee that all will be done for a client the first time around. The passage of time, and reflection, will indicate otherwise. A lawyer always can think of things he wished he had done for his client and case after the case is closed.

(b) On Friday, the last day of evidence, defense counsel offered Professor Barry Nakell of the School of Law of the University of North Carolina at Chapel Hill as a witness. Not a single competent relevant answer made it into direct evidence from this witness. The professor testified that the results of his analysis of certain data about the death penalty, and his own final conclusions about it, and his report about his ongoing

research, would not be ready until "next summer." (This hearing was from November 17-21, 1980.) If the "two" counsel for the defendant had talked to this witness beforehand (and it must be assumed that they did, because a part of the charge of ineffectiveness against original counsel is that he offered three psychiatrists to prove exactly opposite of the trial defense of not guilty by reason of insanity when he, by having their reports, must have known they would testify to the opposite;) they would have known that Professor Nakel was in no position to give any relevant direct evidence of results, conclusions and opinions from his research, and that he would not even reach them until the summer of 1981. There is no way the State in November 1980 could cross-examine about results and opinions that would not be finalized by the witness until "the summer" of 1981.

(c) Cathy Anne Middendorff was sworn as a witness by the defense. She did not give a scintilla of direct evidence. Though brought down subject to be recalled, she was never recalled and was excused in open court by the defense.

(d) Dr. Selwyn Rose can be said to have been offered by the present attorneys to show that Mr. Jacobson could have obtained from him evidence that the defendant was insane at the time of the commission of the offense. However, the answers as given, as recorded within the Judgment, do not measure up to the standard of newly discovered evidence. On the contrary, his answers seem to be in the same category as given by the original psychiatrists at original trial.

(e) Is the present Court to be charged with any specific responsibility to see that present counsel, privately obtained, makes no mistakes? Do these four illustrations indicate present counsel are incompetent, or that these "omissions" are "within the range of competence"? This Court feels that present counsel have given the defendant "high quality representation", and that these illustrations are not the result of any neglect or ignorance as mentioned in Marzullo. It is hindsight that says the several matters could have been handled differently.

5. There is no believable evidence to support the allegation in the motion for appropriate relief that the defendant was denied the effective assistance of counsel.

6. The defendant had a fair and impartial trial. None of her constitutional or other legal rights were denied or violated. The defendant has failed to carry her burden of proof.

7. The defendant is imprisoned by virtue of a legal and final judgment of a court of competent jurisdiction. She should be remanded to the custody of the North Carolina Department of Correction.

8. The defendant was represented by competent counsel, Robert D. Jacobson, who provided her with representation within the range of competence demanded of defense attorneys in capital punishment prosecutions.

9. Defendant's motion for a new trial on the sentencing phase, or phase two, is denied. The defendant's motion for a new trial on the guilt phase, or phase one, is denied. Defendant's motion to vacate and set aside the conviction and/or sentence is denied.

10. The numerous allegations, and evidence concerning the things Mr. Jacobson failed to do, or things he should have done, cannot be said to be so flagrant as to have resulted from neglect or ignorance, rather from informed professional deliberation. Objectively assessed, he was adequate.

11. There is no assurance that had Mr. Jacobson engaged in the type of systematic pretrial and trial motions practice suggested by any and all of the defendant's witnesses here, or that if he had engaged in a different part of them from which he did use, that the outcome of the trial would have been any different. So long as there are counsel in other capital cases who do use a systematic motions practice satisfactory to the case and themselves, and so long as good and competent counsel continue to have verdicts and sentences that result in the imposition of the death penalty in their cases, it remains speculative to say that a given pattern of motions will produce a favorable result to a defendant.

12. The decision of the North Carolina Supreme Court has become "the law of the case." State v Barfield, 298 NC 306 (1979). It is noted that the Supreme Court of Kentucky has said: "The doctrine 'law of the case' includes all errors relied on for reversal, whether mentioned in the Court's opinion or not, and all errors lurking in the record on first appeal, which might have been, but were not expressly relied on." Cited in Black's Law Dictionary, Revised 4th Edition, Page 1030.

Although present counsel contend that even though "the law of the case" applies, the original counsel was ineffective within the range of his competence for that he should have done the challenged things, and that he failed to perform. However, there is no absolute duty of original counsel to have done all, or a combination of all, the things contended by present counsel, and the law of the case still applies.

A post-conviction hearing is no substitute for an appeal. Post-conviction cannot be used to "reassert" identical assignments of error raised on appeal.

13. The Supreme Court of North Carolina on direct review of this case said at page 319:

> "Though Mr. Jacobson carried a great burden in representing the defendant in a capital case, we do not find it to have been so disproportionate to that borne in the usual course of criminal defense work so as to have required the court to have appointed another attorney to provide assistance. We would add, parenthetically, that Judge McLean's order reflects favorably upon Mr. Jacobson's professional background and experience, indicating that he was competent to represent the best interests of the defendant. It is our opinion that Mr. Jacobson gave defendant high quality representation."

14. The evidence about the four other deaths by poisoning was properly admitted under the rules of law and evidence as have been accepted and interpreted by the North Carolina Supreme Court.

15. The whole of the trial judge's charge, both in the guilt phase and the penalty phase, were in the record on appeal to the Supreme Court. That Court gave those instructions a close scrutiny. If there was legal error within any of the instructions as given, the Supreme Court would have said so. To the contrary, it found no error. It "combed the record."

Mr. Jacobson had no duty to request the jury instructions, or legal theories of the law as instructions, as alleged by present counsel. The trial judge gave valid lawful and constitutionally proper instructions to the jury in each phase of the trial.

16. It is not constitutional error for the trial judge to refuse to advise the jurors in a capital case of the consequences of their failure to reach a nonunanimous verdict as to the sentence recommendation.

17. The statute, N.C.G.S. 15A-2000 et. seq., and all of its parts have been held to be constitutional by the North Carolina Supreme Court. This Court, having examined all of the contentions of the defendant, concludes that North Carolina's death penalty statute is constitutional and survives the specific challenge made herein.

18. The Supreme Court of North Carolina fulfilled its statutory duties in this case, as required by N.C.G.S. 15A-2000 et. seq., 298 NC 306.

19. There is no "newly discovered evidence."

20. The fact that present counsel have shown that different or additional evidence could have been presented at the original trial, if Mr. Jacobson had asked for background and other information properly, or if he had investigated properly, does not prove, on this record, ineffectiveness of counsel, or rise to be newly discovered evidence.

21. This Court has read the transcript of the original trial, has carefully reviewed each of the allegations raised in the motion for appropriate relief, has carefully read all briefs of counsel, and other legal citations, and now feels it would serve no useful purpose to try and write a specific response herein to each contention raised in the motion for appropriate relief, and believes that the conclusions herein stated conform to the law in support of its ultimate decision.

22. Parenthetically, and on further reflection, it is noted that on Sunday, November 16, 1980, the Pittsburg Steelers and the Cleveland Browns

played a football game that went down to the last six seconds before victory for the Steelers. With three minutes left in the game, twice the Steelers failed to score from within inches away of the goal line. Passes were dropped, and the fullback couldn't run it over. Terry Bradshaw is as good a professional quarterback as can be found in the business. Yet, he could not achieve a score for his team with only inches to go for a touchdown. In the waning moments, with six seconds left, a second chance came when Bradshaw threw what proved to be the winning touchdown pass, as he found Swann free in the end zone.

The living room quarterbacks, the Monday morning quarterbacks, and the T.V. announcers, during those last three minutes were saying that the World Champion Steelers blew it; meaning that they did not take advantage of their opportunities, or perform as professionals, and that they "failed to play within the range of their competence." It is interesting to note that while passes had been dropped earlier, in the last six seconds it was a pass play which won the game.

While football and a person's life are not to be equated in value, the perfect game in sports or life is yet to be played. Success --- and failure --- always look different in hindsight.

Now, therefore, IT IS ORDERED that:

1. The defendant, Margie Bullard Barfield, had a fair and impartial trial and appellate review; and none of her constitutional or legal rights were denied or violated.

2. The motion for appropriate relief is denied and dismissed.

3. The judgment and sentence of the Court entered in this case is legal, valid and proper, and was entered in full compliance with due process of law.

4. The sentence imposed is authorized by law.

5. The petitioner is remanded forthwith to the custody of the North Carolina Department of Correction.

6. The stay of execution issued by this trial court on October 9, 1980 is hereby dissolved. Considering the provisions of N.C.G.S. 15-194, it is ORDERED that a new date for execution is set as the third Friday from entry of this Order, to-wit: on December 12, 1980.

7. One copy of this Judgment shall be forwarded by the Clerk of Superior Court of Robeson County to each of the following persons: Margie Bullard Barfield, North Carolina Department of Correction, Women's Division, 1022 Bragg Street, Raleigh, NC 27603; James D. Little, Attorney at Law, 310 Dick Street, Fayetteville, NC 28103; Richard H. Burr, III, Southern Prisoners Defense Committee, Box 120636-Acklen Station, Nashville, TN 37212; Joe Freeman Britt, District Attorney, 16th Judicial District, Robeson County Courthouse, Lumberton, NC 28358; Donald W. Stephens, Assistant Attorney General, State of North Carolina, Justice Building Raleigh, NC 27602; and the Secretary of the Department of Correction, Raleigh, NC 27603.

This the 26th day of November 1980.

E. Maurice Braswell

E. MAURICE BRASWELL
- JUDGE PRESIDING -

APPENDIX B

NO. 69

SIXTEENTH DISTRICT

ROBESON COUNTY

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

* * * * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA

v

MARGIE BULLARD BARFIELD

ORDER

* * * * * * * * * * * * * * * * * * *

On 2 December 1980 defendant filed with this Court a Petition for a Writ of Supersedeas pending our consideration of her Petition for a Writ of Certiorari. The defendant's Petition for Writ of Supersedeas was allowed by the Court in conference on 6 January 1981.

The Court has today considered and does hereby deny defendant's Petition for Writ of Certiorari.

It is, therefore, ordered that the Writ of Supersedeas entered by Carlton, J., on 6 January 1981 be and the same is hereby dissolved and terminated.

The Warden of Central Prison will proceed as by law provided, and a copy of this order will be certified forthwith to the following persons:

Governor James B. Hunt, Jr., Raleigh, N. C.
Richard L. Griffin, Assistant Attorney General
Robert D. Jacobson, Attorney at Law, Lumberton, N. C.
Joe Freeman Britt, District Attorney, Lumberton, N. C.
Lee J. Greer, District Attorney, Whiteville, N. C.
Clerk of the Superior Court, Bladen County,
Elizabethtown, N. C.
Warden of Central Prison, Raleigh, N. C.

BY ORDER OF THE COURT IN CONFERENCE, this 8th day of July, 1981.

Meyer, J.

For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 9th day of July, 1981.

J. GREGORY WALLACE
Clerk of the Supreme Court of
North Carolina

A TRUE COPY
J. GREGORY WALLACE
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Shanda Pennington
DEPUTY CLERK
July 15 19 81

ROBESON COUNTY

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

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STATE OF NORTH CAROLINA)
)
v) ORDER
)
MARGIE BULLARD BARFIELD)

****

In light of the enactment on 9 July 1981 of Chapter 900, Session Laws of 1981, rewriting G.S. 15-194, the Order of this Court entered on 8 July 1981 and certified on 9 July 1981 is modified to read as follows:

On 2 December 1980 defendant filed with this Court a Petition for a Writ of Supersedeas pending our consideration of her Petition for a Writ of Certiorari. The defendant's Petition for Writ of Supersedeas was allowed by the Court in conference on 6 January 1981.

The Court on 8 July 1981 considered and denied defendant's Petition for a Writ of Certiorari.

It is, therefore, ordered that the Writ of Supersedeas entered by Carlton, J., on 6 January 1981 be and the same is hereby dissolved and terminated.

The District Attorney of the Thirteenth Judicial District shall promptly calendar a hearing, as required by G.S. 15-194, to fix a new date for the execution of the original sentence; said hearing to be in a Superior Court of the Thirteenth Judicial District. James D. Little, Esquire, Counsel for the defendant, shall be notified of and shall attend said hearing. A copy of this order will be certified forthwith to the following persons:

Governor James B. Hunt, Jr., Raleigh, N. C.
Richard L. Griffin, Assistant Attorney General
Robert D. Jacobson, Attorney at Law, Lumberton, N. C.
Joe Freeman Britt, District Attorney, Lumberton, N. C.
Lee J. Greer, District Attorney, Whiteville, N. C.
Mrs. Wanda S. Campbell, Clerk of Superior Court, Bladen County, Elizabethtown, N. C.
Ben Floyd, Clerk of Superior Court, Robeson County, Lumberton, N. C.
Sam P. Garrison, Warden, Central Prison, Raleigh, N. C.

BY ORDER OF THE COURT IN CONFERENCE, this 13th day of July, 1981.

For the Court

The foregoing order is issued over my hand the seal of the Supreme Court this 13th day of July, 1981.

J. GREGORY WALLACE
Clerk of the Supreme Court
of North Carolina

A TRUE COPY
J. GREGORY WALLACE
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By Shirley Pennington
DEPUTY CLERK

APPENDIX C

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. --

(a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which

outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. -- Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c.406, s. 2.)

§ 15A-2001. Capital offenses; plea of guilty. -- Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c.406, s. 2.)

§ 15A-2002. Capital offenses; jury verdict and sentence. -- If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison. (1977, c.406, s. 2.)

§ 15A-2003. Disability of trial judge. -- In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c.406, s. 2.)

APPENDIX D

The following jurisdictions, through the statutory provisions indicated, require the mandatory imposition of a life sentence upon the sentencing jury's inability to reach a unanimous verdict:

(1) Arkansas--Statutes Annotated, Criminal Code, Chapter 13, §41-1302 (1977)

(2) Delaware--Code Annotated, Title 11, §4209(d) (1977)

(3) Louisiana--Revised Statutes, Code of Criminal Procedure, Article 905.8 (1979)

(4) Maryland--Annotated Code, Article 27, §§413(i), (k)(2) (1979)

(5) Mississippi--Code Annotated, Title 99, §§99-19-103 (1977)

(6) New Hampshire--Revised Statutes, Chapter 630, §§630:5 (IV), (V) (1977)

(7) New Mexico--Statutes Annotated, Chapter 31, §31-20A-3 (1979)

(8) North Carolina--General Statutes, Chapter 15, §15A-2000(b) (1979)

(9) Oklahoma--Statutes Annotated, Title 21, §701.11 (1976)

(10) Pennsylvania--Consolidated Statutes Annotated, Title 18, §§1311(c)(iv), (v) (1978)

(11) South Carolina--Code of Laws, Title 16, §16-3-20 (C) (1977)

(12) Tennessee--Code Annotated, Title 39, §§39-2404 (h), (i) (1979)

(13) Utah--Code Annotated, Title 76, §76-3-207(2) (1977)

(14) Virginia--Code, Article 4.1, §§19.2-264.4(D)(1), (E) (1977)

ORIGINAL

NO. 81-5372

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARGIE BULLARD BARFIELD,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

WHETHER A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-5372

MARGIE BULLARD BARFIELD,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Margie Bullard Barfield and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Robeson County, North Carolina. In an opinion reported in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), the Supreme Court of North Carolina found no error and affirmed the judgment of death. Thereafter, the Petitioner sought post-conviction relief in the Superior

Court of Robeson County, alleging ineffective assistance of counsel and various other purported constitutional errors in the trial of this case. After an evidentiary hearing the Superior Court of Robeson County entered an order denying relief. The Superior Court's opinion is unreported and is attached to the Petitioner's Petition as Appendix A. The Supreme Court of North Carolina thereafter denied review which Petitioner sought; that Order is attached to the Petitioner's Petition as Appendix B.

JURISDICTION

The Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."
>
> §15A-2000 [See Appendix C of the Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

On March 28, 1978, the Robeson County Grand Jury returned a true bill of indictment charging the Petitioner with the murder of Stewart Taylor on or about 3 February 1978. After change of venue on Petitioner's motion, this charge was tried in the Superior Court of Bladen County beginning November 27th and concluding on December 2nd, 1978. At trial, the prosecution presented evidence that at the time of his death Stewart Taylor was approximately fifty-six years of age. He had been in fairly good health up until the time of his death. The Petitioner and Mr. Taylor had been dating for some period of time prior to his death and the Petitioner had obtained and forged a number of checks from the personal checking account of Mr. Taylor. Apparently, in fear of what he might do upon discovering such forgeries, she put Terro ant poison in his food and in his tea on January 31, 1978 and February 1, 1978. Thereafter, Stewart Taylor lived until February 3, 1978; however, he suffered nausea, vomiting, diarrhea, great pain in his muscles, chest and abdomen, and became very dehydrated. An autopsy performed at the request of the family revealed that Stewart Taylor died of acute arsenic poisoning. In a statement to authorities thereafter, the Petitioner admitted this poison-

ing, the poisoning of her mother, Lillie McMillan Bullard in 1974, the poisoning of Mrs. Dolly Taylor Edwards in 1976, and the poisoning of Mr. John Henry Lee in 1977. At the time of the poisoning of John Henry Lee, the Petitioner was a housekeeper and nurse's aide for Mr. Lee and had forged a check from Mr. Lee's personal checking account. At the time of the poisoning of Mrs. Edwards, the Petitioner was a housekeeper for the victim. At the time of the poisoning of her mother, the Petitioner admitted that she had forged her mother's name to a note in favor of the Commercial Credit Company of Lumberton and was afraid that her mother would find out about the note. Therefore, she put poison in her mother's soup and soft drinks. Subsequent autopsies of all of these victims revealed that they died of acute arsenic poisoning. Although the Petitioner did not admit any involvement in the death of her husband, Jennings L. Barfield, his body was exhumed by court order and toxicological screenings indicated that varying levels of arsenic were present in his body tissue. It was the opinion of the forensic pathologist that Jennings Barfield died of arsenic poisoning.

Through her confession and her testimony at trial, the Petitioner's evidence showed that she had a history of drug abuse and that she forged or stole money to support her drug habit. She thereafter, in fear of being caught, would then poison the persons from whom she took money.

The jury found the defendant guilty of murder in the first degree of Stewart Taylor; the jury also found, during the sentencing phase of the proceeding, that such murder was committed for pecuniary gain, was committed to hinder the enforcement of the law, and was especially heinous, atrocious or cruel. Upon finding such aggravating circumstances beyond a reasonable doubt, and upon finding that such aggravating circumstances were sufficiently substantial to outweigh the mitigating circumstances and to call for the imposition of the death penalty, the jury recommended that a sentence of death be imposed.

Pursuant to the provisions of G.S. 15A-2000(d), the Petitioner thereafter appealed her conviction and sentence to the Supreme Court of North Carolina. On November 6, 1979, that Court found no error and upheld this conviction and sentence. Following that decision, the Petitioner filed with this Court a Writ of Certiorari which was denied on June 30, 1980; her Petition for Rehearing was denied by this Court on September 17, 1980.

On October 3, 1980, the Petitioner initiated State post-conviction proceedings in the Superior Court of Bladen County. Such proceedings were transferred to the Superior Court of Robeson County and an evidentiary hearing was held on Petitioner's Motion for Appropriate Relief, which hearing commenced on November 17, 1980, and continued through November 21, 1980. On November 26, 1980, the Superior Court entered judgment denying and dismissing the Petitioner's Motion for Appropriate Relief. Thereafter, the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina to review the Superior Court's judgment was denied on July 9, 1981. The proceedings before this Court were then commenced.

REASONS WHY THE WRIT SHOULD NOT ISSUE

North Carolina law, G.S. 15A-2000(b), requires that the jury sentence recommendation in a capital case be unanimous. If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the trial judge then must impose a sentence of life imprisonment. Although the statute does not specifically provide that the jury will not be informed of the procedures to be followed upon their inability to reach a unanimous sentence recommendation, the North Carolina Supreme Court in two opinions has indicated that the jury should not be advised of the consequences of their inability to reach a unanimous sentence recommendation. [State v. Hutchins, ____ N.C. ___, 279 S.E. 2d 788, 807 (1981);

State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752, 761-62 (1979).] The Supreme Courts of Virginia and Tennessee have reached a similar conclusion on this issue. [Justus v. The Commonwealth, 220 Va. 971, 266 S.E. 2d 87 (1980); Houston v. The State, 593 S.W. 2d 267, 278 (Tenn. 1980).] However, the Louisiana Supreme Court has reached a contrary conclusion. [State v. Williams, 392 So. 2d 619, 633-635 (La. 1980).]

The Petitioner now argues that there is such a conflict among the states on this crucial issue so that this Court must intervene on the issue to resolve the conflict. It is the opinion of the Attorney General of North Carolina that the decision of the Louisiana Supreme Court in State v. Williams, supra, is not well-reasoned, is not supported by the decisions of this Court, and does not therefore constitute the applicable law on this issue. It is further the opinion of this Attorney General that the decisions of the North Carolina Supreme Court, the Supreme Court of Virginia, and the Supreme Court of Tennessee, are well-reasoned and are supported by the decisions of this Court and therefore correctly resolve this issue. That being the case, there is no compelling necessity that this Court grant the Petitioner's request for certiorari to resolve this issue.

In State v. Johnson, supra, the defendant at trial requested an instruction by the trial court to inform the jury of the effect of their failure to reach a unanimous sentence recommendation. Assigning the trial court's failure to so instruct as error on appeal, the defendant raised such issue in the North Carolina Supreme Court. That Court in its opinion indicated that such an instruction "was not a proper matter for jury consideration." The Court indicated, "At best, the requested instruction would be of absolutely no assistance to the jury in making its recommendation. At worst, the instruction would permit the jury to escape the onerous task of recommending the sentence to be imposed." The Court made a similar

observation in State v. Hutchins, supra.

The Virginia Supreme Court addressed the same issue in Justus v. Commonwealth, supra, and made the following observation: "The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. While this was a correct statement of law, it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree." Likewise, the Tennessee Supreme Court reached a similar conclusion in Houston v. The State, supra. Tennessee law [T.C.A. §39-2404(h)] prohibits the judge or the attorneys from commenting at any time to the jury on the effect of the jury's failure to agree on punishment. In upholding this particular statutory provision the Tennessee Supreme Court said, "This statute does not deprive the jury of any knowledge of relevant evidence or aggravating circumstances or mitigating circumstances, necessary for them to fix punishment. It does no more than prevent the judge and counsel from informing the jury of the effect of its disagreement on which sentence should be imposed. The after-effect of a jury deliberation is not a proper consideration for the jury."

As noted by the North Carolina Supreme Court in Barfield and Hutchins, the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), prohibits unbridled jury discretion in cases in which death is a possible punishment. This Court indicated in Furman that the State's statutory system in capital cases must be one which appropriately limits and guides jury discretion in the imposition of such sentences. Thus, for a statutory scheme in a capital case to pass constitutional muster, it must be one which will preclude a jury from arbitrarily recommending or causing to be imposed a sentence of death in a case in which under the facts and the law such sentence is unwarranted; likewise, that system must also preclude

a jury from arbitrarily recommending or causing to be imposed a sentence of life imprisonment where under the facts and under the law, death is the only appropriate sentence. Thus, it is the opinion of the Attorney General of North Carolina that Furman requires that the statutory scheme in the trial of capital cases must be one in which the jury will not be allowed to arbitrarily impose a death sentence where the law and the facts support the imposition of a life sentence; likewise, this system must be one in which the jury will not be allowed to arbitrarily impose or cause to be imposed a life sentence, where the law and the facts support a sentence of death.

Consistent with the requirements of Furman, the North Carolina legislature has enacted G.S. 15A-2000, effective June 1, 1977, which carefully limits and guides jury discretion in the sentence recommendation in capital cases. This statute, for the most part, closely resembles the statute enacted by the State of Georgia and upheld by this Court as constitutional in Gregg v. Georgia, 428 U.S. 153 (1976). The jury discretion allowed by this statute is, likewise, consistent with that allowed in Florida and Texas which was approved by this Court in Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976).

The North Carolina Supreme Court in its subsequent opinions construing G.S. 15A-2000, has indicated that the trial jury, the trial judge, and the trial prosecutor, all act within certain parameters of guided and limited discretion in sentencing. In State v. Jones, 299 N.C. 298,261 S.E. 2d 860 (1980) and in State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), the North Carolina Supreme Court indicated that neither the District Attorney nor the trial judge had the discretion to arbitrarily recommend or impose a life sentence where there is evidence of aggravating circumstances which should be submitted to the jury. Likewise, if the jury determines from the evidence and beyond a reasonable doubt that there are one or more aggravating cir-

cumstances and that these outweigh all mitigating circumstances and that these are sufficiently substantial to call for the imposition of the death penalty, the jury has no discretion in their recommendation. The jury may not ignore the evidence and the law which limits and guides their discretion. The jury may not arbitrarily and capriciously "choose to recommend mercy" without any meaningful direction or safeguards, any more so than they can arbitrarily and capriciously choose to recommend death.

The sentencing function of the jury in a capital case is a grave responsibility. In a constitutionally acceptable capital statutory scheme, both the State and the defendant are entitled to a sentence recommendation that is based solely on the facts of the case and the law. Given those facts and the applicable law, the jury must use its limited and guided discretion in fashioning a sentence recommendation. The jury must act within those guidelines and limits. The jury may not arbitrarily and capriciously act in favor of either side in making a sentence recommendation. The jury has no more right to arbitrarily impose a life sentence than it does to arbitrarily impose a death sentence. It is clear from the opinions of this Court in Gregg, Proffitt, and Jurek that the death penalty can be imposed only within a statutory framework in which there is guided and limited discretion which minimizes the risk of wholly arbitrary and capricious action. Any instruction by the trial court which informed the jury of an alternative procedure which would allow the jury to avoid its grave responsibility in sentencing, would broaden, as opposed to limit, jury discretion and would maximize, as opposed to minimize, the risk that the jury or a juror would act arbitrarily and capriciously. Thus, by such an instruction, the jury would become aware that it had the unbridled discretion to cause the imposition of a life sentence by simply failing to agree within a reasonable period of time. Therefore, such an instruction by

a trial judge to a jury in a capital case, would return us to a pre-Furman system whereby the jury would have the opportunity at their whim or pleasure to be merciful to some but not to others, with no enforceable guide or limit to their discretion. Such an instruction would render fatally defective an otherwise constitutional capital sentencing scheme.

Coming to a contrary conclusion, the Louisiana Supreme Court in State v. Williams, supra, made the following statement:

> " . . . [T]he members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.
>
> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequences of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action."

The Attorney General of North Carolina strongly disagrees with the above conclusion by the Supreme Court of Louisiana. Allowing the jury to remain uninformed of the consequences of their failure to decide unanimously upon a sentence recommendation is far less likely to bring about arbitrary and capricious action than is a procedure which instructs the jury of such consequences and thereby provides the jury [or an individual juror] with an opportunity and an invitation to abandon their responsibility. Irrespective of the circumstances and facts of the case, it provides the jury with the opportunity to ignore the limits on their discretion and to arbitrarily cause the imposition of a life sentence. Worst of all, such an instruction allows a single juror, without limit or restraint, to arbitrarily and capriciously cause such a result.

The old capital statutory sentencing schemes which were rendered fatally defective by Furman, which authorized a jury "recommendation of mercy" without guidance in the unbridled discretion of the jury, at least required that the jury act collectively in such a recommendation. The scheme now proposed by this Petitioner would allow a single juror to cause the imposition of a life sentence, knowingly, intentionally and arbitrarily, without such juror ever having to agree on anything. The Petitioner's proposed instruction to the jury would not minimize the risk of arbitrary and capricious action by a jury; to the contrary, such a proposed instruction would increase the risk of arbitrary and capricious jury action or inaction.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court gave the following mandate and explanation to the State of North Carolina and to the other states which utilize capital punishment:

> "This means that if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' [citations omitted] It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

This Court in Beck v. Alabama, 447 U.S. 625 (1980), indicated that procedural rules in both the sentencing phase as well as the guilt phase of a capital case that tend to diminish the reliability of the guilt determination process or the sentencing determination will be invalidated. In evaluating these procedural rules, the Court notes that the final analysis is whether or not such rule "interjects irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue. . ."

It is the opinion of the Attorney General of North Carolina

that an instruction similar to the one proposed by the Petitioner to a trial jury in a capital case would interject an irrelevant consideration into the fact finding process and would divert the jury's attention from their solemn responsibility to evaluate the facts under the law and to make a sentence recommendation.

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be denied for she fails to set forth any meritorious basis upon which relief should be granted. North Carolina General Statute §15A-2000 is constitutional as interpreted and applied by the North Carolina Supreme Court and by the Superior Court of Robeson County in this case. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard, the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. This sentence was imposed under an unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted on this the 23rd day of September, 1981.

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Donald W. Stephens, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorneys of Record for Petitioner Margie Bullard Barfield, by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Richard H. Burr, III
Southern Prisoners' Defense
Committee
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Nashville, Tennessee 37212

James D. Little
Singleton, Murray, Harlow
& Little
Drawer 1210--Heritage Square
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This the 23rd day of September, 1981.

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